e Natural History of Law

Inaugural Lecture

DELIVERED BY

E. G. DE MONTMORENCY

Of Peterhouse, Cambridge
and of the Middle Temple, Barrister at Law

Quain Professor of Comparative Law
in the University of London

At University College, Gower Street
November 24, 1920

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THE NATURAL HISTORY OF LAW

THE accession of a new professor to a well-established Chair places him as well as his hearers in an initial difficulty. He is necessarily subject to the cleansing fires of comparison with his predecessors, and such a process is not conducive to equanimity. At the best he approaches his work with a chastened spirit, and in his attempt to indicate the lines of thought which he proposes to follow he is likely to steer with uneven keel between the Scylla of mere imitation and the still more dangerous Charybdis, the whirlpool of forced originality. These difficulties are peculiarly obvious in the case of a professor of Comparative Law who succeeds Sir John Macdonell, a man of untiring industry and resourceful idealism, whose capacity for research in many fields of law is coupled with a sense of literary effectiveness possessed by few jurists. To imitate him in his own spheres of work would be a counsel of perfection which I do not propose to follow. Yet if the professor turns his frail bark from the rocks of Scylla and seeks safety from comparison by steering for the open sea of new research, he suddenly sees before him the seething waters of Charybdis, whirling the bodies of earlier adventurers, some slain by the sea, but most butchered by one another.

My first duty, then, is to steer ahead without shipwreck, while ever bearing in mind the example set by my predecessor and never forgetting that any attempt to reach new waters is fraught with perils; the perils of ignorance, of over-confidence, of pettiness of soul, of the competitive as opposed to the collaborative mind. With such thoughts at heart, I steer for the open sea with the

far-off hope that it may be possible some day for some one to formulate the principles which underlie the evolution of human law and custom. These principles seem to be implicit in the manifestations of human consciousness, as the principles formulated by Newton and Mendel are implicit in the manifestations of inorganic and organic matter, principles only to be detected through patient investigation, by the comparative method, of innumerable and correctly recorded customs and laws from all parts of the world. The formulation of such principles may be near at hand or may be many decades away. It is not the business of a plain investigator to trouble about that. He that believeth shall not make haste. Yet it is more than useful to have such a goal in view and to feel that perhaps some day the enormous labours of men in the fields of sociology and customary law during the past two centuries and longer may, by the advent of a Newton or a Mendel, suddenly become effective, and, revealing the guiding principles of organized human life, make possible a better world.

That this is not likely to happen in our generation does not trouble me at all. To have the hope in view is enough. That hope is an inspiration which enables the mind to look forth without despair upon the vast ocean of research, so largely uncharted, unlit, a waste of twilight waters filled with moving shadows. It is not only an inspiration to the individual, it is a call to conjoint effort. Something of the spirit of a new Renaissance should be with us. There will be no solitary workers, no competitive scholars greedy for fame, jealous of each other. There will be, there are, collaborative Schools of Research bringing gradually into subjection the customary law of our day and of past days throughout the world and testing it with that comparative method which is a prime instrument

of scientific progress. It is the clear duty of any professor of Comparative Law to become, if possible, the organizer of a School of Research, itself perhaps the nucleus of a great centralized school of law.

Law as the subject of scientific study appears to be passing into a new phase which has been in conscious preparation for a full century. Human law has itself become the subject of law in the estimation of the scientific mind. It is, almost beyond doubt, the outward manifestation of perdurable forces. Professor Vinogradoff has declared[1] that one of the objects of the comparative study of law is to aim 'at discovering the principles regulating the development of legal systems, with a view to explain the origin of institutions and to study the conditions of their life'. The study of the evolution of law, he points out, must be both historical and comparative, since evolution involves the idea of sequence while the basis of any scientific induction is dependent on the comparison of kindred processes. Indeed, it is plain that the doctrine of relativity is essential to any advance. No doubt the comparative process is very old, but it has only become effective in the light of the doctrine of organic growth or evolution. This conception was working in pre-Darwinian days. David Hume, in his famous *Dialogues concerning Natural Religion*, based all his thinking on the inevitable orderliness of the inorganic world, and indeed he premised such a condition as the basis of any thinking at all about the processes of the natural universe. Yet it may be said that the argument from Design for the existence of a Supreme Being, so confidently adopted in the days before Darwin set forth his doctrine of Natural Selection, received, to say the least, a severe

[1] *Encyclopaedia Britannica*, 11th ed., vol. xv, p. 580, art. *Jurisprudence, Comparative.*

shock in the elaboration of that doctrine and, though the principle of essential orderliness was extended by Mendel from the inorganic to the organic world, yet for some thinkers this orderliness in both spheres seemed to be nothing more than mechanical phenomena with no necessary relation to a Creative Thinker or Force. Mr. Arthur Balfour in his Gifford lectures, delivered at the University of Glasgow in January and February 1914, developed a line of thought which presented the argument for Design from a new point of view, and for many minds rehabilitated this argument by showing that the mechanical account of the universe depends not only on the assumption of an infinitely improbable accident but makes no provision for creative force, and that the theory of Natural Selection in no way explains the human values which are the unexpected product of the essential orderliness of inorganic and organic phenomena. Mr. Balfour provides an argument from Value to Design. If Design be absent, the value is lost of our most valuable beliefs and their associated emotions. He shows that Design 'is demanded by all that we deem most valuable in life: by beauty, by morals, by scientific truth: and that it is design far deeper in purpose, far richer in significance, than any which could be inferred from the most ingenious and elaborate adjustments displayed by organic life'. That is Mr. Balfour's view and theme.

I do not in any way apologize for introducing this theme, this reference to Natural Religion, since it is pertinent to the subject which I am considering and is itself one of the great subjects of the Comparative Method. Indeed any student of customary law is aware that it is impossible to divorce the Natural History of Law from the History of Natural Religion. It is evident, if Mr. Balfour's closely reasoned argument in favour of a doctrine of Design based on the emergence

of human values holds the field, that the extension of the principle of orderliness from the organic to the social world, as it was extended from the inorganic to the organic, is a matter of the first importance, since it is in the evolution of human society, in the processes of the natural history of human law, that we see, in all their wonderful richness, the evolution of human values.

It appears to me impossible to escape from what Mr. Balfour calls the 'theistic setting' of things, and if I adopt his view as stated in the last paragraph of his work on *Theism and Humanism*, I seem to find a key to the apparently heterogeneous phenomena with which I have been faced in perusing some of the almost infinite variety of customs and laws that exist in what I may call, with a sense of the imperfection of the term, the non-Aryan world.

Mr. Balfour's view is that God

> is Himself the condition of scientific knowledge. If he be excluded from the causal series which produces beliefs, the cognitive series which justifies them is corrupted at the root. And as it is only in a theistic setting that beauty can retain its deepest meaning, and love its brightest lustre, so these great truths of aesthetics and ethics are but half-truths, isolated and imperfect, unless we add to them yet a third. We must hold that reason and the works of reason have their source in God; that from Him they draw their inspiration; and that if they repudiate their origin, by this very act they proclaim their own insufficiency.

Now if we adopt Mr. Balfour's view as to the necessary outlook of man in his present stage of development, if we keep in mind the history of natural religion among tribal peoples, and if we also hold that some principle of orderliness underlies the evolution of the social world, then it is not impossible to hope for the scientific formulation of that principle as a result of the comparative study of law.

If it ever prove possible to enunciate, by the method which has already formulated invariable laws governing the relations of matter and the processes of growth, invariable laws lying behind and governing the apparently heterogeneous religious, social, and political relations of man, then not only have we secured a powerful ally in promoting the argument from Design for the existence of a Conscious Thinking Force at the heart of things (a matter with which I am not directly concerned), but in formulating these laws we secure the means to enlarge human values in a measure hitherto unknown to our human race.

The significance of the historical method in the study of law is not the least fruit of the Renaissance, and it has some relevance to the above position to which I must draw attention before attempting further to develop that position. As early as 1539, Aymarus Rivallius issued the first known history of the Civil Law, a work of importance which was supplemented by the vast labours of Jacques Cujas (1522–1590), who placed Roman Law on a new footing and brought it into relation with the laws which it was destined to affect. In these two jurists of the Renaissance we see the historical and comparative method operating together at a moment when Andrea Alciati had already given new life and literary form to the study of jurisprudence. A chain of eager workers, ending with Léon-Étienne Pütter (1725–1807), William Blackstone (1723–1780), Gustave Hugo (1766–1844), and Friedrich Karl von Savigny (1779–1861), the first great master of the historical method in law, placed the historical and philosophical study of law on a firm basis. For the moment I am concerned with Savigny, turning to Blackstone later, since Savigny enunciated for all time that principle of continuity in law which is vital

in any theory of the nature or origin of law. He showed the world that law itself is subject to law, that it is no arbitrary expression of the will of the law-giver but is itself a thing obedient to a cosmic process. To show that law is itself the expression of a juristic process that runs through the ages was in itself an achievement of the highest order; but to go on to trace, as Savigny traced, the natural history of law, to exhibit its organic growth as a living thing, evolving with the evolution of races and tongues and kingdoms, was a still greater triumph. In his work entitled *The Vocation of our Age for Legislation and Jurisprudence*, which he issued in 1814 as a protest against the new code system of law, he declares that the apparent need for codes is due to 'an immense mass of juridical notions and theories' which has never been brought under control. No code could, however, destroy this inherited wealth. He follows Hegel in declaring that

> it is impossible to annihilate the impressions and modes of thought of the jurists now living—impossible to change completely the nature of existing legal relations; and on this two-fold impossibility rests the indissoluble organic connexion of generations and ages; between which, development only, not absolute-end and absolute-beginning, is conceivable.

Here, as early as 1814, the doctrine of legal evolution is laid down in no doubting spirit. But Savigny goes farther than a mere enunciation of this doctrine or law. He declares that we must conquer the mass of juridical material, 'obtain the mastery over it by a thorough grounding in history, and thus appropriate to ourselves the whole intellectual wealth of preceding generations'. Only through history, he says, 'can a living connexion with the primitive state of the people be kept up; and the loss of this connexion must take away from every people the best part of its spiritual life'. This was a

bold utterance, but the claim that the spiritual life in every people is transmitted by its laws and social organization from age to age up from the primitive stage of man has been more and more justified as the study of the natural history of law has proceeded. Savigny is, moreover, not satisfied with laying down principles and setting up ideals: he was a practical lawyer and indicated a practical method of dealing with the mass of juridical material which he had discovered in the customs of his own land. He tells us that the object of the strict historical method of jurisprudence 'is to trace every established system to its root and thus discover an organic principle, whereby that which still has life may be separated from that which is lifeless and only belongs to history'.

The ideas of Savigny are still part of the great stimulating forces in the comparative method of legal research, and they are in no sense inconsistent with the conception that there are fundamental principles which govern the evolution of living law and living human institutions. The organic principle, the discovery of which he declares to be the object of the historical method of jurisprudence, can only be found by the comparative method. I am venturing to argue that this organic principle or process is something inherent in human consciousness and as invariable as the laws which govern the relations of matter or the processes of life. This contention is one that I now propose to approach more closely.

The criticism by which the essential orderliness of material phenomena is sharply divided from the conscious orderliness of human beings following rules of conduct, custom, or the direct injunction of other human beings, is based on the assumption that the processes observed in the various fields of the material

universe are inevitable, whilst the orderliness of a self-conscious being is not inevitable at all and depends on an arbitrary act of choice. The relations between the individual parts of material groups are always theoretically determinable if there are certain premisses given. The material universe is incapable of deviation from a certain orderliness, and if an apparent deviation is detected it is assumed to be due to inadequate or erroneous premisses. The scientist assumes that throughout space and throughout the continuance of time the same kind of orderliness has always persisted and will always persist in the relations of the parts of what is called matter. The assumption has not and cannot have any scientific validity, but so persistent is this orderliness that the scientist, finding confirmation of it in successive discoveries and finding that the assumption itself is necessary to the advance of knowledge, accepts it without attempting to explain it. Most thinking persons have speculated as to the reason of this orderliness in physical nature; some persons regard it as a result of an inherent property of matter; others regard it as an accident; yet others as a necessary function of human consciousness; and others again, premising a reasonable universe, declare that orderliness in nature is a condition precedent to reasonableness in the universe; while many or most are content to attribute orderliness and reasonableness alike to an External Mind closely concerned with the affairs of the universe, a Mind which they call God.

Different considerations arise when we consider matter as the medium of what we designate Life. Life is not less mysterious than the matter with which it collaborates. Life introduces into matter a new specific orderliness which no doubt co-operates with that of matter, but on occasions operates in direct opposition to

it and is always something quite other than such mere physical orderliness. Life transforms matter and gives it new direction and new motion. The origin of life is as unknown as, and even less probably explicable than, the origin of matter; but whatever its origin it creates an orderliness of its own. In a certain inevitable order the protoplasmic germ builds up and presents this or that living form, and each form contains within itself the possibility of new architectonic achievements, that is to say, the possibility of producing, in due course, in inevitable order, forms ever more highly articulated, ever more various and removed from some original stock. In accordance with some fundamental principle of order, life moves from the simple to the complex, from forms that are hardly distinguishable from inorganic crystals to the mammal with its marvellous brain. The stages of this orderliness will be known one day, indeed much of the long road is known already, and certainly enough is known to justify the confident premiss that (as in the case of the material relations of parts of matter) there is an orderliness of universal application throughout space and throughout time which fully explains all genera and species from the dim beginning to the dimmer end. It is true that we cannot prove the universal application of the orderliness of matter and of the orderliness of life. It is an assumption, derived by a special manifestation of life, namely by self-consciousness, from its observation of its environment. It is an assumption, however, that is acted upon by the lowest forms of life long before the stage of self-consciousness is reached. The study of the earliest forms of life will show that life not only anticipates the existence of this orderliness but so adjusts itself as to secure the benefit of the orderliness which subconsciously it anticipates. Indeed this process of adaptation to an orderly environ-

ment is in itself part of the orderliness. The development of lower into more highly articulated forms of life depends upon this adaptableness to environment. There is in life as manifested in matter an orderliness of its own which is something other than that of the evolution of life-forms, an orderliness which subserves the mechanical orderliness of non-organic and organic matter.

This co-ordinating and adaptive orderliness as sub-consciously manifested grows more and more complex as the life-form grows more complex, and at last in the mammal-forms of life it emerges as a definite physical department of the life-forms in the shape of brain and as a definite psychological manifestation of life itself in the shape of self-consciousness. The orderliness now operates both sub-consciously and consciously, but the growth or evolution of the life-form is more and more dominated by the conscious sense of orderliness which is directly, and not merely subconsciously, applied to the problems of self-development. So man emerges from the beast and the conscious reign of law takes the place, ever more and more, of the subconscious reign of the orderliness which we have seen operating in the relations of both inorganic and organic matter and in the adaptation of living matter to the conditions best suited to the development of life-forms. We may say with Richard Hooker that 'obedience of creatures unto the law of nature is the stay of the whole world'. (*Ecc. Polity*, I, iii (2).)

It does not, therefore, appear to be ultimately sound to speak of the so-called 'laws of nature' as having nothing in common with the laws evolved by human agency for man. From *a priori* reasoning it appears to be probable that there are elements in human consciousness as stable as the inherent conditions of stability and perma-

nence in a non-conscious, non-vital, material structure. It is, in fact, unconvincing to argue that the 'laws' of man are not in any particular form essential to the existence of man, while the 'laws' of nature are in that form and no other form essential to the existence of matter and are indeed an essential element of it. Such a view is, no doubt, impressive in view of the enormous variations and the apparent inefficiency of man-made laws. A human law-giver, however wise, and however extensive his legislative intentions, seems to legislate, in fact, for particular cases and not for the universal guidance of human self-consciousness. The human legislator at his highest seems to be dealing merely with special needs, seems to be aiming at the elimination of special evils. We cannot compare, it might be and is indeed often said, the orderliness of physical nature which reveals itself in what are beyond doubt invariable rules of action with the orderliness of man which reveals itself in obedience to diverse rules of action which are apparently as variable as the will of the person who at any given moment is responsible for the formulation and enforcement of such human rules of conduct.

We are therefore in this position: *a priori* there is a common basis to the 'laws' of nature and the 'laws' of man to the extent, at any rate, that there is a persistent and actual orderliness in human consciousness of the same nature as the orderliness observed in the relations of particles of matter; while, on the other hand, many of the laws prescribed by man for the conduct of men are plainly outside the coherent reasonableness which alone is compatible with a permanent element in human consciousness of the same nature as the permanent element in material particles. In other words, it is true to say that many human laws are outside the purview of a universal jurisprudence—are the products of minds

which by perversion of judgement or by the exercise of free choice have defied the essential reasonableness and orderliness of human consciousness. Eminent jurists have not hesitated to argue from this that all human law is of the same nature; that all positive law is dependent on the eccentricities or wilfulness of a human sovereign and contains no essential element of permanence. This view forms a direct negative to the *a priori* view set out above. If it is confirmed by the facts, when they are fully revealed, of the history of human law, then the *a priori* argument is displaced (as all *a priori* arguments are liable to be displaced) and the fortunes of the world are permanently at the mercy of a blind social process which divides mankind into tyrants and slaves. If the Austinian conception of human law is true, the whole history of human freedom has been illusory and futile.

But does the history of human law necessitate this conclusion? Does it show that humanity is necessarily at the mercy of the sword and the stake? So far from this being the case, the 'natural history of law', even so far as we imperfectly know it to-day, goes far to confirm the *a priori* theory formulated above. Indeed, Sir William Blackstone in effect adopted, in his second section of the *Introduction to the Commentaries*, this theory, and Austin in his *Lectures on Jurisprudence* attacks him for doing so. Austin complains that Blackstone in common with the Roman jurists fancies

> that a rule of law made on a pre-existing custom exists as *positive law*, apart from the legislator or judge, by the institution of the private persons who observed it in its customary state.

That is the issue between Blackstone and Austin; and on the ultimate analysis it is the issue of Might against Right. In saying this I do not forget the indebtedness of jurists to Austin in many fields of jurisprudence nor

do I overlook the necessity for concrete methods of securing the administration of justice.

It is necessary to ask, not from pure theory but from practice, illustrated by the history of law, as the confirmation of theory, is there any element common to all systems, to every known system of human law? It might be better to ask whether there is a legal system from which this element is absent? So far as our material goes it seems not possible to find a system from which this sense of obligation is absent. In every record it seems to be present, whether we are considering the humblest inchoate customary system or the most stately product of the evolution of law. Through many centuries practical jurists and judges, with their intimate and accumulated knowledge of human nature and its needs, have detected this element and have unhesitatingly accepted 'the law of nature', that is, of human nature. One of the functions of the comparative study of law and human institutions is to test, from the comparison of the raw material supplied by many almost elemental races in many lands, whether this law of nature has a universal sway.

It is not proposed here to discuss the source of those permanent elements in matter and in consciousness. It is sufficient to be satisfied that they exist and to be satisfied, at any rate in the case of consciousness, that they evolve. Blackstone boldly attributes them to 'the Will of God', and it is certainly not necessary to dissent from such an attribution. To whatever source we attribute the permanent elements in human consciousness which are responsible for the *ius naturale*, we have to look for the sanction which lies behind that law, for the 'something about me that tells me *Fides est servanda*', to use the striking phrase of Selden. The sanction is clearly not the sanction of which Hobbes wrote and which Austin adopted: 'the command of him or them

that have coercive power'. The law which is obeyed is not obeyed because the sword lies behind it. The sanction is not the sanction of force. Force is often enough an administrative or secondary sanction, but it is not the primary sanction. Coercion is a weapon of law which law has forged, but it is not the basis of law.

It is provisionally submitted that the history of human law confirms this position and reveals, whether in inchoate customs governing the relationship of man and woman and man and man and the relationship of an individual to a group in the most unsophisticated tribes, or in the most advanced systems of law, principles that are as apparently invariable as the Newtonian laws of motion or the Mendelian laws of life. It is the business of schools of jurists to collate the masses of historical and juridical material available in order if possible to formulate these invariable principles with accuracy and precision, and it is perhaps not entirely rash to attempt to indicate in provisional fashion the broad lines of those principles. It would seem that the following propositions indicate lines on which research might work:

1. A dominant tendency of the individual man (in direct heredity from an earlier grade of being) is to strive so to regulate the group to which he belongs as to afford to the group, and therefore to the individual, a maximum of protection from its environment.

2. Within the group the relations of individuals are always tending towards stability of conduct, and this tendency is due to an evolving principle in consciousness which is represented by the phrase *Fides est servanda.*

3. A dominant tendency of a group which has attained some measure of corporate life is to strive so to regulate the sum-total of groups to which it belongs as to afford to the aggregate of groups, and therefore to itself, a maximum of protection from its environment.

In considering human relationships we have to estimate:

(1) The relations of man and man;

(2) The relations of man and a group of men;

(3) The relations of groups of men;

(4) The relations of men or groups of men to an influence or force, or influences or forces, that is or are extra-human, or apparently extra-human, the existence of which is or are inferred from certain phenomena associated with the personality of man.

The first and fourth forms of relations seem to emerge before the second and third. But the four classes of relationships seem to have existence in the very earliest dawn of history. Sexual relationship and the up-bringing of children apparently involve the existence of the first class before anything in the nature of the conscious grouping of individuals began, though unconscious grouping must have begun very early in the history of the race for purposes of mutual protection against wild beasts and for conjoint hunting of wild beasts. Palaeolithic cave paintings seem to show us two things in the early stages:

(i) Recognition or worship of the extra-human forces referred to in the fourth class, and

(ii) Conjoint hunting of wild beasts.

This evidence seems confirmed by modern evidence drawn from existing races. Thus Sir James Frazer has shown that all the Australian, Papuan, and Polynesian races have an intense sense of immortality, a vivid belief in spirit life, and, in the case of the Central Australians, he shows us the exact evolution of the conception of a spiritual and unseen God.[1] This modern evidence goes farther and shows us the relationships referred to in classes (2) and (3). Independent hunting groups arise

[1] *The Belief in Immortality*, vol. i, p. 115.

and come into touch and recognize each other as something other than themselves and set up well-defined relations. It is not important here to discuss the distinctions between groups that were merely hunting groups and groups the individuals of which sprang, or claimed to spring, from a common ancestry. Possibly the original fortuitous hunting group merged into a group of individuals in which blood-relationship ratified and perpetuated the original protective grouping. However that may be, the dawn (I say nothing about the primitive beginnings) of human co-operation saw all these four classes of human relationships set up.

The basis of all these relationships was and is mutual effort and support, not instinctive strife. The only possible exception was the relations of groups, and even here the Australian and American evidence shows that in many ways the groups had elements of mutual support. In all the other cases it is self-evident,—the fact is supported by the cave pictures and by the practices of existing races—that not strife but mutual effort and support was, and is, the basis of relationship. It was not that the age was ideal and man still uncorrupted. Probably man was more brutal—though many elemental races are more civil and more moral, as we understand these terms, than more (apparently) advanced races—certainly the times and the environment were harder. But it was the sternness of the environment—the harshness of nature, the dangers from wild beasts, the lack of knowledge—that necessarily determined the basis of association. Indeed we may with a high measure of certainty postulate the fact that it was the environment which evolved man himself as the only creature who could capture and harness nature by virtue of association. The condition of survival was mutual effort and support. The woman could not rear the child without

the active assistance of the man: the child could not grow to manhood without the active assistance of the adult; the adult could not alone provide against the environment. Grouping for environmental protective purposes occurs in every stage of evolution from the bee-hive to the buffalo-herd, and in man it becomes conscious and creative. Hence the basis of the relationship of man and man and of man and a group of men was mutual effort and support. The conditions of such mutual effort and support were determined by the environment of the individuals and the group; as so determined in the long course of experience these conditions emerged in the shape of customs. Necessity is not only the mother of invention, it is the inventor of laws. Environment determines law. Adaptation to environment is the condition of survival. Custom was the method by which man adapted himself to the environment. To break custom was to face death. So that obedience to law, though it might be due immediately to fear of a human individual, or fear of a human lawgiver, ultimately was based upon an original fear (perhaps an acquired characteristic) of becoming by this action or that passivity unadapted to a particular environment and therefore doomed to destruction. Obedience to law ultimately was due to fear of incapacity to grapple with an environment, but the fear itself was begotten by mutual effort and support, by, in other words, what we call Love: that is to say, the recognition of the necessity to provide against the dangers of environment sprang originally from the Love of Kind, the will to preserve the species. 'Another law there is', writes Hooker, 'which toucheth them as they are sociable parts united into one body; a law which bindeth them each to serve unto other's good, and all to prefer the good of the whole before whatsoever their own particular.'

It is not altogether vain to ask how this basis of mutual effort and support came into existence. We have to look at the fourth class of relationships: to inquire into the significance of the religious attitude of early man. Now without inquiring into the basis of that attitude we can say this: that the attitude, whether or not it be explicable on purely utilitarian grounds, is certainly explicable on the assumption that there exists in relation to the whole range of sentient and non-sentient phenomena a self-conscious Being of infinite power, the source of the causal series. If we assume, merely for the purpose of explaining that religious attitude of man which comes to light in every investigation into tribal customs, the existence of such a Being, and also for the same purpose premise the not uncommon customary belief that it is His purpose to create beings that partake of His nature and character, we seem to be driven to the following conclusion: that such beings could only eventually come into existence by a long-drawn-out process of development or growth in which absolute free will or choice operates amid the circumstances of evolution. A being that is to partake of the nature and character of God could not be created *per saltum*, for it would then lack the fundamental characteristic of the postulated God—Freedom. It would be an automaton. The being must in a more than Hegelian sense *freely become* God-like. That attitude is congruent with the 'theistic setting' of things as well as with the evolutionary processes determined by invariable principles residing in consciousness. At every stage of evolution the evolving being must be free to choose and must choose the environment by which alone evolution along the necessary line is possible. The choice becomes more and more difficult as the organism becomes more and more complex. But as the choice becomes more

difficult the power of choice becomes more intense, more self-conscious, until at last there comes a moment when 'mind' is at work, when the evolving being looks 'before and after' and feels that it is part of an ordered universe. At that moment the sense of both worship and law is born. It is then no longer a question of quasi-unconscious adaptation to environment. The sense of the necessity of adaptation to environment has become a ratiocinative sense. The physical hunger to reach the goal, which, operating under freedom of choice, has led the organism to this point, becomes a spiritual hunger looking everywhere for guidance, and a mental hunger devising ways and means of progress. The spiritual hunger visualizes, in this way or that (in the Central Australian way, for instance), inadequate representation of some Force imagined or intuitively conceived of as residing in the Realms of Help or the Regions of Punishment, and that Force so represented is the basis of Sanction in Religion. The mental hunger, in devising ways and means of successive adaptation to environment, looks for a sanction that shall make the ways and means binding on the whole group to which the being belongs, and for that purpose uses the sanction that religion has already provided. Thus a God of infinite power, the source of the temporal series, if once postulated, does explain the actual process of evolution from the elemental germ to man and does account for the perfectly normal emergence of both religion and law as we understand them. But whether we introduce the postulate or not to explain the process, we see the process as an historic fact. A consciousness of God came into existence, and among tribal peoples gave them the basis of sanction both in religion and law, at the moment when man became conscious that he *must*, if he were to progress or even survive, adapt himself cease-

lessly to an environment which is itself ceaselessly becoming a different environment.

Hence the ultimate basis of sanction would seem to be, not the word of a law-giver, but something that we may call intuitive and inseparably interwoven with the consciousness of the law-obeyer. He obeys in the ultimate analysis because the law is the expression of his own fundamental nature. The moment that this is not so it means either that

(1) The man or group has reached a stage when the necessity of adaptation to environment demands a modification of the law, or

(2) That the man, or group of men, has not yet reached the stage when the particular law is the machinery that fits him or it to his or its environment, or

(3) That the man, or group of men, in the exercise of free choice, deliberately refuses to adapt himself or itself to the only means of progress or refuses to progress or even to survive.

Now these three classes of disobedience to law in fact supply us with the theory that is exemplified in the actual working out of human society. The first class shows us law evolving as social life progresses. It shows us man in revolt against conditions that have become intolerable and harmful. The whole of the history of freedom, the Reformation and the Renaissance of successive ages, is taken up by this process: that first one man, then a party of men, then whole nations awake to the fact that the law which was intended to fit man to his environment is outgrown and that a new law of adaptation must be fashioned. We see here the principle that has determined the history of constitutional law, of municipal law, and the underlying fact that is even now determining the progress of international law. The second class of disobedience to law, the case where

the man or group has not yet reached the stage when the particular law imposed upon him is the machinery of adaptation that is needed, is of peculiar importance for the consideration of the legislator and the ruler of inferior races. The moment that we consider it, we see at once the flaw that vitiates so much of modern criminal law. Even in societies of white men there is a percentage of the population that belong in fact to an earlier stage of civilization, and their crimes against the law are often the very efforts that to them instinctively are right efforts to fit themselves to their environment. It is education not punishment that these classes need. With them there is no *mens rea* but a *mens adaptiva* which belongs to an earlier period of evolution. That mind must be raised to the new environment. This is equally true of inferior races. To impose upon such races the laws and morals of a higher race inevitably leads to the disintegration of all law and all morals. Only by education can the process of evolution be hastened, by education as unforced as it is wise. The last class, the man or group that in the exercise of free will deliberately rejects adaptation to environment, is the only class that really possesses the *mens rea*. This is the criminal class, and it is the business of legislation to ascertain and segregate this class.

We thus see that the basis of sanction in law, if ascertained according to the above analysis, does in fact lead by pure *a priori* reasoning to the whole network of questions in municipal and international law that have arisen during the last century, and more particularly in the last quarter of a century, and lays down principles that, in theory at least, are capable of solving those problems. It is suggested that in this fact, in the approach through pure theory to actualities of the present time, there lies a confirmation of the theory advanced.

With such a tentative and provisional, but seemingly not unreasonable, conception in mind it is possible to turn to the apparent welter of customary law and its infinite variations in different regions of the earth with a mind that is not entirely afraid of its material. Savigny bade us to conquer this material. He had no doubt that it is governed by an organic law of growth, and conquest lies in the discovery of this law. To do so the worker must have some guiding principle at the back of his reading and thinking. It is not necessary that the principle should be absolutely true. Progress comes by trial and failure. But some principle, some approximation to truth, must be the instrument of reference as the processes, laborious, tiresome, endless, of the comparative method go on. But such a provisional principle, such an instrument of reference, must not become a hide-bound theory to which the investigator fits his facts. Into that error some of the very elect have fallen, never to rise again. Any theory, any alleged principle, must meet the facts. If it cannot, however attractive, or even noble, it may seem, it must disappear. The theory was made from and for the facts. The facts do not exist for the sake of the theory, and the investigator who fits his facts to the Procrustean bed of his theory, in any region of scientific thought, courts and deserves disaster. The various theories that have been advanced to account for the phenomena of tribal law have always to be tested in such a way, and the investigator who ties himself down to some special theory of the universal order of the evolution of institutions, such, let us say, as a theory that a Matriarchal or Mother-Right stage necessarily precedes a Patriarchal stage, is adopting not only a daring but an unscientific course.

For my own part, in so far as I have any theory at all

as to the progressive order of human customary institutions and law, I should say, from the material with which I am so far conversant, that the character of the development is fundamentally a function of the environment, though I am not prepared to deny that there are internal factors due to special characteristics of special races which may also affect the development, and I am not prepared to assert or deny that these special characteristics, if they exist, are inherited characteristics, springing from environment. I think, however, that it is to environment in the main to which we have to look for the explanation of the almost infinite varieties of customs among tribal peoples, though I am entirely of the opinion of Professor Vinogradoff that the explanation of similarities and differences in customs and institutions must take into account immigrant loans, common origins, consecutive stages of evolution, and the psychological unity of human beings. Yet environment is the dominant and moulding force. I should not expect to find any common basis in some remote period for all human institutions. The human being striving to fit himself and his kind to a particular environment must produce results markedly differentiated by different environments. On the other hand, I should expect to find in the case of a race which has spread out in many directions from a restricted area modifications of the most diverse kinds produced by great variations of environment, but nevertheless modifications which do not obscure dominant characteristics acquired in the original restricted area.

This method of tracing back by the comparative method diverse races to a common source has been used in different forms for the greater part of a century. The Indo-European race, for instance, has stimulated efforts in many directions. Jacob Grimm used the method to

prove the relations between branches of Germanic law. Professor Vinogradoff has pointed out that by the comparative study of terms in different Indo-European languages, Adolphe Pictet in 1859–63 endeavoured 'to reconstruct the common civilization of the Aryan race', and B. W. Leist strove (in his Jus Gentium and Jus Civile of the primitive Aryans) 'to reconstitute the fundamental rules of common Aryan law before the separation of tongues and nations, but also to trace the influence of this original stock of juridical ideas in the later development of different branches of the Aryan race'. He writes 'the history of one set of principles exemplified and modulated, as it were, in the six or seven varieties of the race'. The same idea was developed by Otto Schrader. For the moment I pass by the work of Henry Sumner Maine in order to complete another line of reference. In 1861 J. J. Bachofen announced the existence of matrilineal institutions in Europe and laid the basis of a theory, which seems to me to be dogmatic and unprovable, universally placing a matriarchal stage before the patriarchal stage and after a group-marriage stage in the evolution which has given us our modern institutions. In pursuit of this doctrine, J. F. McLennan enunciated the theory that exogamous tribes who developed the dangerous art of marriage by capture brought us into the region of patriarchal rule and agnatic relationship, while the practice of endogamy or marriage within the group gave birth to non-patriarchal institutions based on mother-right. On the other hand, Westermarck and Malinowski repudiate matriarchy altogether and stand for universal patriarchy, though they have to admit matrilineal descent. This universal patriarchate springs, we are told, from individual pairing and sex jealousy. Then again we have Lewis H. Morgan's theory of group marriage and promiscuity,

which apparently does not accord with any of the facts, despite decades of tireless research.

The masses of Aryan and non-Aryan material have indeed given imagination a very free field, and it is some relief to turn from speculation based on imperfect material to the exact thinking of Sir Henry Maine, though it must be remembered that his work has not rescued the Aryan race from speculation of the most daring kind. Only within the last few weeks there has been issued from Berlin a substantial tome on the origin and history of the Aryan race, by Karl Georg Zschaetzsch.[1] The author claims to have traced back the Aryan race no less than 29,500 years, the research being based on comprehensive mythological, etymological, and religio-historical traditions of the various nations of antiquity. I am not venturing to criticize the book, but I turn with relief to the outlook of Sir Henry Maine, for if sanity is to be found anywhere we shall find it in the shadow of that august name.

Sir Henry Maine at any rate had few affinities with Herr Zschaetzsch. He regarded the comparative study of the Aryan group from another point of view. Mythology and philology he left to others. 'For him', writes Professor Vinogradoff,

> the comparison between the legal lore of Rome and that of India did not depend on linguistic roots or on the philological study of the laws of Manu, but was the result of recognizing again and again, in actual modern custom, the views, rules and institutions of which he had read in Gaius and in the fragments of the Twelve Tables.[2]

He restricted himself to the study of the Aryan race and

[1] *Die Herkunft und Geschichte des arischen Stammes* (1920, 527 pp.).
[2] *Encyclopaedia Britannica*, vol. xv, p. 582.

in his *Law and Custom* he opposed in a determined manner the attempts of more daring students to extend to the Aryans generalizations drawn from the life of savage tribes unconnected with the Aryans by blood.

What then is the debt that the student of the comparative study of law owes to Maine? Sir Frederick Pollock has answered the question:[1]

> Not one of his books makes, upon the face of it, anything like a profession of accounting for the ultimate origin of human laws, or settling the relations of jurisprudence to ethics, or connecting the science of law with any general philosophical system or with any scientific account of social development.

He was, on the other hand, a jurist

> whose business is to give us examples of method. . . . Maine did nothing less than create the natural history of law. He showed on the one hand that legal ideas and institutions have a real course of development as much as the genera and species of living creatures, and in every stage of that development have their normal characters; on the other hand he made it clear that these processes deserve and require distinct study, and cannot be treated as mere incidents in the general history of the societies where they occur.

No doubt there are available to-day masses of material of which Maine was ignorant, and it is also true that he shrank from the task of grappling with the problems which were presented in his time by the accumulation of non-Aryan material. He held views as to matriarchal institutions which may or may not be sound, but which at any rate seem sounder than any that are to-day put forward. Yet the physical limitations that Maine necessarily set upon his own efforts were not limitations of method or outlook. His method remains unshaken and is indeed unshakable.

In *Village-Communities* (third ed., p. 266) he sets out the determining condition of all advance. He says:

[1] *Edinburgh Review*, July 1893.

The great principle which underlies all our knowledge of the physical world, that Nature is ever consistent with herself, must also be true of human nature and of human society which is made up of human nature. It is not indeed meant that there are no truths except of the external world, but that all truth, of whatever character, must conform to the same conditions; so that, if indeed history be true, it must teach that which every other science teaches, continuous sequence, inflexible order, and eternal law.

That puts in a few terse sentences much of the essence of what I have laboured to present in this Inaugural Address. Therein lies the principle by which alone can be revealed the natural history of law. In the presence of such a principle all unrealities, all sophisticated theories, all wild dogmatism, all short cuts to the secrets of the universe and of the heart of man, disappear. The natural history of law becomes the object of pure science, that is to say, of diligent research, of hard thinking, of patient application of thought to material; and it becomes something more than a pure science, for in the results of right working and right thinking in this field we may see on some far horizon a better and more contented, and a more spiritual race.